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Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of)
)
Amendment of Parts 1, 21 and 74 to)
Enable Multipoint Distribution)
Service and Instructional)
Television Fixed Service Licensees)
To Engage in Fixed Two-Way)
Transmissions)

MM Docket No. 97-217

File No. RM-9060

To: Chief, Video Services Division
Mass Media Bureau

COMMENTS OF THE SAN FRANCISCO-SAN JOSE
EDUCATOR/OPERATOR CONSORTIUM

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SUMMARY

The San Francisco-San Jose Educator/Operator Consortium (the "Consortium") fully supports revision of the Commission's rules to expedite two-way ITFS and MDS services. If appropriate changes are made in the Commission's programming and procedural rules and certain rules are retained, the proposed technical rules will provide licensees and commercial operators with flexibility to address local educational needs as well as market-specific technical and commercial considerations. To this end, the Consortium believes the Commission should retain its existing ITFS minimum programming and recapture rules, clarify that shifted programming may be used to satisfy the ITFS programming requirements and that educators, not Commission staff, determine which programming is educational, revise its rules to ease channel swapping among and between ITFS and MDS licensees, and eliminate the ten year term limit on ITFS channel leases. In addition, the Consortium urges the Commission to adopt further safeguards against unanticipated harmful interference created by new two-way facilities, including expedited procedures for resolving post-grant interference.

SUMMARY

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EDUCATOR/OPERATOR CONSORTIUM**

The San Francisco - San Jose Educator/Operator Consortium (the "Consortium") hereby submits these Comments in response to the Commission's Notice of Proposed Rulemaking, FCC 97-360, MM Docket No. 97-217, released October 10, 1997 ("NPRM").¹

INTRODUCTION

The Consortium consists of the Roman Catholic Communications Corporation ("CTN/San Francisco-San Jose"), the Regents of the University of California - on behalf of the University of California, Berkeley and University of California, San Francisco ("UC"), the Association for Continuing Education ("ACE"), Peralta Community College District ("Peralta"), the Santa Clara County Board of Education ("Santa Clara BOE"), San Jose State University ("San Jose State") and

¹ The NPRM was initiated at the request of over one hundred participants in the industry, including the Wireless Cable Association International, Inc., system operators, MDS and ITFS licensees, and others (collectively, the "Petitioners"). As set forth on the Attachment hereto, the Consortium has separately urged Barbara Kreisman, Chief, Video Services Division, to approve the two-way transmission ruling on an expedited basis.

their operator lessee, Wireless Holdings, Inc. ("WHI"), d/b/a Bay Area Cablevision, Inc.² The seven educators in the Consortium are licensed for a total of 42 ITFS channels, 22 serving the northern San Francisco area region and 20 serving the San Jose region to the south. Several of these educators have been operating ITFS stations and providing educational programming to students as part of their academic curricula since 1970. For the past ten years, the Consortium, through its quarterly meetings, has served as a vehicle for developing educational programming, addressing local interference concerns, sharing information regarding technical innovations and industry developments, providing technical assistance during operating emergencies and sharing maintenance equipment. Consortium members presently provide extensive distance learning services.

Since its acquisition of MDS and ITFS channel and airtime lease rights in the San Francisco and San Jose areas in 1994, WHI has been developing a platform for digital video distribution as well as high speed Internet access. Over the past three years WHI, in cooperation with the educator members of the Consortium, has been aggressively pursuing the collocation and upgrade of facilities in the San Francisco Bay area and the coordination of these stations with facilities and systems operating in adjacent communities.

The Consortium represents precisely the sort of educator/wireless cable operator partnership envisioned by the Commission when it implemented its ITFS excess capacity leasing provisions in 1983. See Amendment of Parts 2, 21, 74 and 94 of the Commission's Rules and Regulations in Regard to the Instructional Television Fixed Service, the Multipoint Distribution Service, and the Private Operational Fixed Microwave Service, Report and Order, 94 FCC 2d 1203 (1983). It is

² WHI and its related companies operate systems in Tampa, Florida and Spokane, Washington and are presently developing systems in San Francisco, San Jose, Santa Rosa, San Diego and Victorville, California as well as in Greenville, South Carolina.

respectfully submitted that, because of Consortium members' achievement in working together to create viable distance learning, digital video delivery and Internet access services in San Francisco and San Jose, the members of the Consortium are uniquely well-positioned to comment in this proceeding.

The Consortium applauds the Commission's far-reaching proposals for implementing two-way ITFS and MDS services. The technical standards proposed in the NPRM plus the willingness of all Consortium members to work together to address technical issues will provide both ITFS and MDS licensees with adequate protection from harmful interference while affording the flexibility to design two-way systems tailored to market-specific needs and conditions. However, the full benefit of these technical changes will never be realized unless the Commission revises certain of its programming and procedural rules and retains others. Specifically, the Consortium recommends that the Commission ensure that both ITFS and MDS licensees have full access to program shifting and channel swapping and maintain their existing ITFS programming rules and other requirements concerning excess airtime leases. The Commission must stand firm against demands to revise the longstanding ITFS programming requirements in any way that could diminish educators programming flexibility. Based on the Consortium's experience, the public interest has been well served and will continue to best be served through the current rules, which provide educators and operators with the necessary flexibility to tailor their contractual relationship to their specific needs and interests in each market. In addition, the Consortium believes that the Commission should adopt additional safeguards to prevent harmful interference in connection with ITFS and MDS two-way applications. In particular, the Consortium believes that Commission staff should review applications before placing them on public notice and should adopt expedited procedures for

resolving post-grant interference complaints.

DISCUSSION

I. The Existing ITFS Programming Requirements Need Not Be Revised

A. There is no basis for changing the minimum programming hours and recapture requirements.

The Consortium believes that imposing higher minimum programming obligations on ITFS licensees will have the unintended consequence of removing the incentive and ability of operators to invest in digital equipment, decreasing the increased revenues potentially available to both ITFS licensees and their excess capacity lessees.

By giving both the licensee and the operator sufficient flexibility to meet their specific needs, the Commission's existing minimum programming and recapture requirements have advanced the educational use of ITFS frequencies while at the same time allowing commercial operators to maximize deliverable channel capacity in order to effectively compete in the marketplace. With the imposition of increased minimum programming requirements, necessary flexibility is lost, and with it many of the benefits that may well be more important to the parties than additional airtime. The Commission should not overlook an ITFS licensee's dependence on its excess capacity lessee's revenue stream. Neither ITFS licensees nor their lessees will be able to provide expanded services if the Commission adopts a too restrictive approach to ITFS programming.

The Commission's existing rules afford each ITFS licensee flexibility to meet its specific needs. Mandating additional minimum hours of ITFS programming ultimately will hamper local ITFS licensees' flexibility to address the educational needs of the students they serve. Educational needs vary among institutions and among communities. While some ITFS licensees may have the need to maximize programming time, for others, including members of the Consortium, additional

and/or special equipment, additional receive sites or response stations, and similar benefits may take precedence over additional airtime.

Based on the experience of its members, the Consortium believes the Commission should continue to permit ITFS licensees and their excess capacity lessees to craft airtime agreements based on the specific needs of each. CTN/San Francisco-San Jose, for example, successfully negotiated for additional airtime well beyond that required under the present rules. Section 3.1(b) of its lease with Bay Area Cablevision, Inc. (WHI subsidiary) provides for additional educational programming time beyond the standard 20 hours of primary airtime and 20 hours of “ready recapture” time required by the FCC’s rules. See FCC File No. BRIF-970127DA. Id.

The Commission has recognized that there is no logical connection between an increase in spectrum capacity and educators’ need for additional airtime. See General Electric Co., 61 RR 2d 146 (1986)(commonly referred to as “Comband II”). In Comband II, General Electric Co. sought a declaratory ruling that ITFS licensees using its “Comband” technology to deliver two separate video signals on a single 6 MHz channel should not be required to increase programming commensurate with the doubling of programming capacity. The FCC granted the request, stating that:

The Comband system creates the potential for a significant increase in programming capacity with no increase in required bandwidth. We believe the maximum use and development of such capacity in an environment unburdened by regulation is to be encouraged. For this reason, licensees utilizing the Comband system will not be required to provide additional ITFS programming for each path created.

Id. at 147. Central to this finding was the recognition that there is no direct nexus between increased capacity and the need for additional programming time.

The logic behind Comband II applies equally in the present circumstances. ITFS licensees should not be required to meet additional programming requirements at the expense of developing other educational services they may have identified. Rather than requiring ITFS licensees to use increased spectrum capacity to provide more instructional programming, the Commission should permit ITFS licensees to work with their excess capacity lessee to maximize the benefits to both the licensee and the lessee. For example, an ITFS licensee should be able to obtain increased financial compensation, Internet access, equipment and other services rather than increased airtime if those benefits are more in line with the licensee's educational needs.

The FCC similarly should not increase its recapture time requirements. Such an increase also would conflict with the Comband II precedent and substantially decrease the mutual benefits ITFS licensees and commercial operators stand to gain through implementation of digital and/or two-way services.

If the FCC were to introduce requirements for additional recapture time beyond 40 hours, ITFS licensees would have reduced flexibility in providing other types of educational services and the overall channel capacity of the systems would be decreased, to the detriment of both the ITFS lessor and its excess capacity lessee. Few ITFS licensees have yet to completely develop their systems to fully utilize the recapture time presently required under the FCC's rules. For a licensee that does not have need for airtime in addition to the 40 hours reserved to it under existing rules, a requirement that additional airtime be reserved will be of no benefit and will only serve to reduce the commercial operator's competitive viability by decreasing the number of channels of services or types of communications services it can offer. In San Francisco - San Jose, the present rules regarding recapture have adequately met the needs of both the ITFS licensees and the operator.

As the Commission well knows, ITFS licensees are largely dependent on their excess capacity lessees to finance construction of their station and receive sites and to introduce technologically advanced services. Thus, in most circumstances, an ITFS licensee's ability to provide distance-learning or implement the vast array of educational services contemplated in the NPRM depends on their lessee's access to revenues or financing. In a traditional analog system, a commercial operator develops its revenue stream or business plan based on the specific amount of excess airtime (which, with channel loading, translates into a specific number of channels) available from its ITFS (and MDS) lessors. The same holds true for a digital system, but to a greater extent because of the greatly increased capital expenditures necessary for design and implementation. To justify construction of a digital system and/or secure necessary financing, a commercial operator must have access to the increased channel capacity that is the result of digital technology. The fewer channels available to the commercial operator, the less likely digital implementation will be financially viable.

In short, increased minimum ITFS programming requirements will exact a financial burden on both educators and operators, reducing the likelihood that either students or consumers can fully enjoy the benefits of digital technology.

B. The Commission should clarify its programming recapture requirements

The Commission's existing requirement for recapture of ITFS excess capacity is 20 hours of "ready recapture" time in addition to the 20 hours required to satisfy the minimum programming requirements, for a total of 40 hours reserved by the licensee. See 47 C.F.R. § 74.931(e)(2); Amendment of Parts 21, 74, 78 and 94 of the Commission's Rules Governing Use of the Frequencies in the 2.1 and 2.5 GHz Bands, 6 FCC Rcd 6764, 6773-74 (1991) ("Wireless Cable Reconsideration

Order”). In the NPRM, the Commission interprets the recapture rule and relevant precedent to mean that 20 hours of recapture time must always be reserved, regardless of the amount of time actually used by an ITFS licensee. This interpretation is without foundation. The FCC itself acknowledges that when it first imposed a recapture time requirement, it did so within the context of the overall 40 hour per channel per week airtime reservation such that the actual amount of airtime subject to recapture could be less than 20 hours per channel per week provided the actual and recapture time together satisfied the 40 hour standard. NPRM at ¶ 66. Contrary to the assertions in the NPRM, the Commission in the Wireless Cable Reconsideration Order did not abandon this approach in favor of an “absolute” 20 hour recapture requirement. The Wireless Cable Reconsideration Order, like prior decisions on this matter, specifically acknowledges the 40 hour per channel per week standard.

In the experience of the Consortium members, these minimum requirements generally are more than adequate to meet educational needs. If a particular ITFS licensee requires additional airtime for educational programming, the Commission’s rules afford flexibility to contract for such additional airtime, as demonstrated in CTN/San Francisco-San Jose’s airtime lease. See Section I.A., supra.

C. **Educators, not the Commission should determine whether programming content is educational.**

Throughout its regulation of the instructional television service, the Commission has recognized that educators, not Commission staff, should identify educational programming content for transmission over the ITFS channels. The introduction of technologically advanced educational services such as the Internet and other interactive programming is no basis for replacing the Commission’s appropriately deferential policy with a paternal approach. The ITFS licensing scheme is based on the role of educators in accredited institutions in evaluating the need for ITFS facilities

and in proposing and executing instructional programming schedules. Regardless of the technology, accredited teachers and administrators are best qualified to evaluate whether particular programming content is educational. Teachers, not FCC staff, are certified by State accrediting authorities to play this role.

Pursuant to Section 74.931 of the FCC's Rules, ITFS programming presently is defined as:

(1) formal instructional programming offered for credit to enrolled students of accredited schools and universities; and (2) so-called "informal ITFS programming," which includes educational and cultural programming and instructional programming such as in-service training, instruction in special skills and safety, and continuing education programs. Under existing FCC policies, formal educational programming can be virtually any programming, so long as it is used in the classroom as a part of for-credit courses taught to enrolled students in accredited schools. An ITFS licensee's use of a particular instructional or educational program as part of its for-credit curriculum qualifies the program as formal ITFS programming. In contrast to formal instructional programming, informal ITFS programming is defined by its content. It can consist of a broad range of educational and cultural programming, including C-Span, series and movies such as those transmitted on public broadcasting or other satellite-delivered sources, and instructional programs not used as part of the for-credit curriculum in an accredited school.³

³ The Video Services Division (the "Division") has in at least one letter ruling stated that Internet and other high speed data services can be used to satisfy the ITFS programming obligations. See Letter, dated February 28, 1994, from Barbara A. Kreisman, Chief, Video Services Division, to Neil S. Ende, Esq. and Wayne D. Johnson, Esq. regarding George Washington University proposal. The Division emphasized that GWU's proposed instructional use of the data qualified it as ITFS programming. Id. The Division specifically stated that its approval of Internet transmissions as qualified ITFS programming was limited to the specific proposal before it. Id. Based on this decision, Internet transmissions presently may be used to satisfy the ITFS programming requirements only if used as part of for-credit academic programs and specific FCC consent is obtained.

In light of recent technological advances, the Consortium believes the Commission should amend its rules to clarify that the ITFS licensee, not FCC staff, is in the best position to determine which programming and/or services are educational. The rules should be amended to specify that Internet transmission and related uses of channel capacity may qualify as ITFS programming as long as the use is part of an academic program and is educational within the ITFS licensee's reasonable judgment. Rather than attempting to definitively determine in a rulemaking proceeding the specific instances in which data and voice transmissions and uplinks may satisfy ITFS licensees' ITFS minimum programming requirements, NPRM at ¶ 69, the Commission should state that all transmissions by ITFS licensees to students enrolled in an accredited institution that are directly related to the education of the students (i.e., not used for recreational purposes) or by students of ITFS licensees under the same circumstances may satisfy the minimum programming requirements provided the transmissions are educational in the licensee's reasonable judgment and continue to recognize informal ITFS programming as an educational use of the ITFS channels.

Modifying the ITFS rules to clearly state that Internet and other interactive services may satisfy the minimum programming requirements accords with current trends in education.⁴ For example, numerous recent pronouncements of national leaders such as President Clinton, Vice President Gore and Education Secretary Riley, and of local educators, herald Internet access as an essential component in the education of America's youth. For example, Vice President Gore on December 10, 1997 announced the distribution of a total of \$425 million in grants to help teachers and students learn how to use the Internet, proclaiming "[t]oday, more than ever, education is the key

⁴ The Consortium notes that Internet services range from two-way data delivery to more advanced video and multiplexed programming services.

to success and we can use technology as a powerful tool to help teach our children what they need to know to compete and win in the 21st century” (Reuters). At the same announcement, referring to the Internet, Secretary Riley noted that “one of the most exciting aspects of American education today is developing this important link between education and technology” (Reuters).

Support for use of the Internet as an educational tool also abounds at the local level. For example, Judy Green, director of Project Rebuild for the L.A. Unified School District, applauded Bay Network, Inc.’s donation of equipment to the Improving America’s Schools Conference, noting that Internet access “provide[d] attendees with online access to valuable resource information to take back to the classroom” (Company Press Release). Referring to his company’s contribution to Public Science Day in Philadelphia, Unisys Chairman, president and CEO Lawrence A. Weinbach noted that “[i]n adding an Internet dimension to this year’s program, we are underscoring technology’s increasingly important role in improving science education” (Company Press Release). Also at the grassroots level, CAI Wireless Systems, Inc. (“CAI”) has successfully implemented a microwave Internet access service in the District of Columbia which serves the D.C. public school system in addition to a number of business users.

As recognized by the Commission and demonstrated by the Internet services provided to schools by CAI and others, the ITFS spectrum is a promising means of providing Internet access to students. NPRM at ¶ 6. By recognizing educational uses of Internet services, the Commission will ensure that the promise of ITFS Internet delivery yields “fast, reliable and affordable Internet access” to students. Id.

Also, universities must not be thwarted from being able to use the proposed two-way transmission capability to support their instructional research and public service missions,

telemedicine, and continuing professional educational services to doctors, nurses, engineers, teachers, pharmacists, lawyers and other professionals as part of the basic services provided by research universities. The Commission must allow all university educators the flexibility necessary to address their unique educational research and public service missions via innovative applications of two-way digital transmission technology. Limiting the amount of educational programming on two-way systems to only video classes would be like limiting professors to using only chalk boards after the printing press was invented. Not only do universities create new knowledge, but they also must be able to develop new methods of sharing that knowledge, utilizing the full capabilities of all technologies at their disposal.

In conclusion, the Commission historically has left the determination of which conventional programming is educational to the ITFS licensee. This policy should be continued.

II. Program Shifting and Channel Swapping Are Essential To Designing Spectrum-Efficient Two-Way Systems

Affording ITFS and MDS licensees flexibility to shift programming is essential to the Commission's goal of promoting spectrum-efficient two-way systems. Under the proposed rules, in almost completely collocated markets such as San Francisco and San Jose, ITFS and MDS licensees will be able to agree to shift (i.e., "re-farm") their channels to create one upstream superchannel at one or the other end of their contiguous downstream spectrum, thereby requiring at most two guard bands to provide interference protection to downstream channels adjacent to the upstream spectrum. Without the flexibility to group ITFS and MDS programming into a contiguous channel block, however, use of a superchannel in configuring a two-way system would place the ITFS and MDS licensees whose programming is shifted at risk of forfeiture under the FCC's ITFS programming and MDS operation rules. A commercial operator would be forced to implement the

less efficient alternative of consolidating upstream and downstream operations into a much narrower band of spectrum and provide an additional guard band on the spectrum adjacent to each band of upstream frequencies in order to adequately protect existing downstream uses. To permit ITFS and MDS licensees in San Francisco and San Jose to benefit from the spectrum efficiencies available where upstream and downstream frequencies are grouped into separate superchannels, the Commission must modify its rules to permit ITFS licensees to satisfy all of their minimum programming requirements through the use of other channels within the system, and also permit MDS licensees to shift programming to frequencies other than their own.⁵

The Commission also should allow channel swaps by and between ITFS and MDS licensees, and revise its rules to expedite such swaps. Although channel swapping between licensees in the same service is available under existing rules, the Commission should amend its rules to permit channel swaps between ITFS and MDS licensees (and vice-versa) and adopt specific expedited procedures for processing assignment applications filed pursuant to channel swap agreements. Such modifications will further encourage expeditious development and construction of two-way systems by permitting licensees to group frequencies in accordance with their educational or commercial objectives and the market-specific technical considerations involved in achieving those objectives. For example, if only two licensee-lessors in a commercial system, the B-Group and F-Group

⁵ In Policies and Rules Concerning Children's Television Programming, Revision of Programming Policies for Television Stations, Report and Order, 3 CR 1385, 1424-5 (1996), the FCC allowed broadcast licensees to meet children's programming requirements by sponsoring programming on other stations in the market. If broadcasters can meet programming requirements through this type of program shifting, ITFS licensees should also be entitled to use such shifting to fulfill their programming requirements. As proposed in the NPRM, the Commission's rules should continue to specify that ITFS licensees may satisfy their programming obligations through the use of channel mapping and channel loading.

licensees, seek to provide two-way services, the B-Group licensee should not be precluded from swapping channels with the E-Group licensee so that the two-way system could be engineered using an upstream superchannel, minimizing the amount of guard band necessary to protect existing adjacent downstream licensees from harmful interference.

The Consortium believes that the existing involuntary modification and displacement rules are sufficient to prevent abuses. See 47 C.F.R. § 74.986; 47 C.F.R. § 74.902(h)-(j).⁶ However, the Commission should carefully review involuntary modification applications to ensure ITFS and MDS licensees' have the necessary freedom to participate or not participate in two-way market configurations.

Full flexibility is key to designing two-way systems which make efficient use of the spectrum and are properly tailored to local needs and conditions. Accordingly, the Consortium opposes the proposals discussed in the NPRM which would dedicate specific channels to upstream or downstream use. See ¶ 74, 76, 60. The proposal to dedicate only Channels MDS-1, MDS-2 and MDS-2A to upstream use would unnecessarily limit ITFS licensees and commercial operators which

⁶ Section 74.986 of the Commission's Rules permits involuntary modification of ITFS facilities to avoid harmful interference where the initiating party cannot invoke the 0 dB interference protection standard because the subject ITFS licensee's equipment was authorized prior to May 26, 1983, the subject ITFS licensee's facilities do not meet existing transmitter tolerance, aural power or out-of-band emissions standards, or upgrade of the subject ITFS licensee's equipment is necessary to permit the initiating party to operate at a higher power level or install a signal booster. 47 C.F.R. § 74.986(a). Such modifications may be initiated only by MDS or ITFS licensees, conditional licensees, permittees or applicants. 47 C.F.R. § 74.986(b). Opposed applicants may not seek involuntary collocation. Id. Section 74.902 of the Rules limits displacement of grandfathered ITFS licensees operating on the E- and F-Group channels to situations where the subject ITFS station is a point-to-point facility and suitable alternative spectrum is available. 47 C.F.R. § 74.902(h). Both the involuntary modification and displacement provisions afford subject licensees 60 days to oppose involuntary applications, 47 C.F.R. § 74.986(c); 47 C.F.R. § 74.902(j). and require the initiating party to cover all expenses, including prospective costs such as electricity and maintenance. 47 C.F.R. § 74.986(d); 47 C.F.R. § 74.902(i).

do not have access to these channels, and harm existing licensees relying on downstream use of these channels. See NPRM at ¶ 74, 76. Efficient use of the spectrum also requires that, upon proper application to the Commission by the associated primary channel licensee, the 125 kHz channels presently designated as response channels be made available for downstream use. See NPRM at ¶ 60.

The Consortium likewise believes that the rechannelization proposal advocated by the national Catholic Television Network organization (“CTN/National”) may not be appropriate for the San Francisco-San Jose market. See Request for Supplemental Comment Period and Extension of Time Filed by CTN/National on November 25, 1997; Order Extending Time for Filing Comments and Reply Comments, MM Docket No. 97-217, released December 5, 1997.

As discussed above, the potential for designing a two-way system and associated interference concerns depend on the existing configuration of stations, which varies greatly among markets. The Commission would hamper development of spectrum efficient uses if it mandated a “one size-fits-all” approach to two-way system design. ITFS and MDS licensees in San Francisco/San Jose, and WHI, should have full flexibility to negotiate among themselves to channel swap, rechannelize, address any interference concerns and program shift on a voluntary basis as appropriate in their specific market. Interference issues such as “brute force overload” will be corrected typically by the operator, as in the past on a case-by-case basis, through the use of filters, traps and beam benders.⁷

As the Commission itself has noted, affording full flexibility to ITFS licensees will

⁷ The Consortium respectfully notes that “brute force overload” is unlikely to occur at all and then only in a market with at least one non-participating licensee and where a response station is constructed within 600 to 1000 feet of an ITFS receive site. The problem may be corrected with filters, traps or beam benders.

“promote[] the underlying educational purpose of ITFS.” See NPRM at ¶ 64. Those that argue that channel shifting and swapping will undermine the primary educational objective of ITFS overlook the voluntary nature of the Commission’s proposed rules and safeguards in the current ITFS rules.⁸ Under the proposed rules, ITFS licensees cannot be forced to shift programming or swap channels, or even operate in a digital mode for that matter. The proposed rules merely permit ITFS licensees in a particular market and their excess airtime lessee to develop a system best-suited to the needs of local educators and local market conditions. See NPRM at ¶ 81. Indeed, the Commission states in the NPRM that it would “not authorize a two-way framework which involves the mandatory participation of any ITFS licensee.” Id. Simply put, if the ITFS licensees and commercial operator in a particular market are not able to agree to a channel shifting arrangement, channel shifting will not occur in the market.

Existing FCC policies provide ITFS licensees with safeguards in the event of commercial failure of their excess capacity lessee. Pursuant to Turner Independent School District, 8 FCC Rcd 3153 (1993), ITFS excess airtime leases are required to provide for equipment purchase by the ITFS licensee in case of lease termination resulting from the excess capacity lessee’s default, including circumstances in which the lessee declares bankruptcy or makes an assignment for the benefit of creditors. Commission staff polices these provisions through its review of ITFS leases to ensure that ITFS licensees have access to equipment upon a lessee’s default. In addition, ITFS licensees routinely negotiate additional safeguards with their wireless cable lessees, such as the right to

⁸The Consortium notes that, pursuant to existing FCC’s rules, an ITFS licensee controls programming content over its licensed channels at all times.

continue to lease space on the tower.⁹ Accordingly, the Consortium respectfully submits that there is no need to further regulate the default provisions of ITFS leases.

III. The 10 Year Term Limit on ITFS Channel Leases Should Be Eliminated

The Consortium believes that eliminating the ten year term limit on ITFS excess capacity leases will encourage speedy implementation of digital two-way services, increasing both the programming options and revenues available to educators and operators. Eliminating the current ten year term limit on leases would be the next, logical step in a process by which the Commission has gradually relaxed its term limitations. Originally, ITFS leases could not extend beyond the term of the underlying license. As a result, commercial operators often were forced to accept short term leases that did not offer the long-term stability required to justify the necessary investment by the operator, and typically demanded by the investment community. In recognition of this problem, the Commission in 1995 amended its rules to permit ITFS airtime leases to extend for up to ten years, regardless of the term of the underlying license. Amendment of Part 74 of the Commission's Rules With Regard to the Instructional Television Fixed Service, Report and Order, 77 RR 2d 213, 222 (1995). Central to the Commission's action was the recognition that the uncertainty created by the then-existing rule made it difficult for operators to justify significant system investments, deterred potential financiers from investing in the industry, and hampered operators in their attempts to bring new investors into the industry. Id. at 222.

In light of the digital transition, this same rationale now supports the elimination of lease term limits. The Commission must recognize that the conversion to digital represents a multi-

⁹ The Consortium believes that FCC staff should continue to review ITFS leases and require amendment of leases that fail to comply with applicable rules and policies. NPRM at ¶ 86.

million dollar investment by the wireless cable industry, an investment that dwarfs that required for analog operations. Few operators will be able to justify this enormous expense, and even fewer lenders will be willing to underwrite it, without assurances of long-term access to the additional channel capacity that is the direct and intended result of these expenditures. For many operators, it will be difficult if not impossible to make the numbers work and attract the necessary funding within a ten year time frame.

ITFS licensees also would benefit from the flexibility offered by excess capacity leases extending longer than ten years. Many of these educators value the assurance of long-term, stable services, including maintenance and operational support offered by a longer lease term. As the FCC acknowledged in adopting the current ten year limit, 77 RR 2d at 222, the existence of a long term lease in no way affects the duration of the underlying license or the licensee's future use of the frequency.

In short, an ITFS licensee and its operator should be able to agree to a longer lease term, when they determine that a longer term is to be in their mutual best interests.¹⁰ Extended lease terms would greatly help operators in justifying their investment in digital equipment and, securing financing, while many educators would benefit from the flexibility to negotiate longer term arrangements.

¹⁰ In an analogous situation, several years ago the FCC abandoned the rule that established a two-year limit on the duration of affiliation agreements between television station licensees and television networks holding that "the preferable course is to give the parties freedom to negotiate what they agree to be the most efficient arrangement in their individual circumstances." In the Matter of Review of Rules and Policies Concerning Network Broadcasting by Television Stations: Elimination or Modification of Section 73.658(c) of the Commission's Rules, 4 FCC Rcd 2755, 2758 (1989). The same result should hold here with respect to agreements between ITFS licensees and commercial operators.

IV. The Commission Should Adopt Additional Safeguards To Guard Against Unanticipated Harmful Interference.

Whatever processing approach it adopts for ITFS and MDS response station hub and booster applications, the Commission must implement additional safeguards to guard against unanticipated harmful interference before adopting its two-way rules.

Without special procedures for resolving harmful interference after grant, the benefits of any processing scheme for two-way applications could be lost, with participants struggling to deal with ever increasing instances of harmful interference. The following safeguards would greatly minimize the potential for such a result. First, the Commission should adopt the stringent interference standards proposed in the NPRM.¹¹ Second, in contrast to Petitioners' proposal, the Consortium believes that tendered applications should receive FCC staff scrutiny prior to acceptance for filing, including review to ensure that the technical showings are adequate and procedures for service on affected parties are fully-satisfied. Third, and most importantly, the Commission should adopt specific procedures for expedited review of interference complaints filed in connection with authorized facilities. The Commission recently proposed expedited dispute resolution procedures in connection with the preemption of state and local restrictions on tower siting. See In the Matter of Preemption of State and Local Zoning and Land Use Restrictions On the Siting, Placement and

¹¹ Where there is predicted harmful interference, the parties may of course enter interference agreements whereby the interfered-with party consents to the applicant's proposed operations and to the Commission's grant of authority for those operations. With regard to the Commission's request for comment on "the reliability of interference agreements" and "whether ITFS licensees are subjected to undue pressure to provide 'no objection' letters," see NPRM at ¶ 48, the Consortium, which consists of ITFS lessors and their wireless cable lessee, notes that it is in both ITFS lessors' and wireless cable lessees' best interests to ensure that ITFS lessors consent to predicted interference only when such interference can be reduced or eliminated through coordinated operations and when ITFS receive sites are protected. Generally, receive site upgrades are provided at no cost to San Francisco-San Jose licensees.

Construction of Broadcast Station Transmission Facilities, FCC 97-296, 62 Fed. Reg. 46241 (August 19, 1997) (“Tower Siting Notice”). These proposed tower siting rules provide that, in circumstances where a local government denies a broadcaster’s request to construct or modify a transmission tower, the broadcaster may petition the FCC for a declaratory ruling within 30 days of the local ruling. Tower Siting Notice at ¶ 9. The Commission is required to act on such a petition within 30 days. A broadcaster electing alternative dispute resolution procedures to resolve its conflict with a local government would have 10 days to file an election notice following an adverse local decision. Tower Siting Notice at Appendix B(d). The Commission would have a total of 15 days following filing of the election notice to appoint an arbitrator, and conduct and complete the arbitration. Id.

The Consortium respectfully submits that expedited review procedures with the option of alternative dispute resolution such as those proposed in the Tower Siting Notice would provide a reliable and timely “safety net” in connection with the grant of ITFS and MDS response station hub and booster applications. Under the Consortium’ proposal, an ITFS licensee experiencing harmful interference to one of its downstream receive sites that is caused by a recently-constructed adjacent channel upstream operation may either petition the Commission for declaratory relief within 30 days of experiencing the interference or invoke alternative dispute resolution procedures within 10 days of experiencing interference. If a petition for declaratory ruling is filed, the Commission would have 30 days to investigate the facts and issue a ruling. If the licensee chooses alternative dispute resolution, the Commission would have 15 days to appoint an arbitrator and resolve the matter. Such procedures would provide prompt resolution of interference issues and ensure that unsubstantiated interference complaints are expeditiously resolved and dismissed.

Provided the Commission adopts expedited procedures for resolving harmful post-grant interference, the Consortium supports the Petitioners' proposal that the Commission implement rolling, one-day filing windows for ITFS facilities and continue to use this processing approach for MDS applications. As some parties have noted, rolling filing windows require that licensees and permittees review the proposals of nearby co- and adjacent channel parties on an ongoing basis. However, the benefit of filing applications to modify facilities on an as-needed basis and the Commission's increased processing speed when its staff is not faced with an insurmountable deluge of applications far outweigh any additional application-review burden placed on licensees.¹²

Provided that rolling, one-day filing windows are implemented promptly afterwards, the Consortium agrees with the Commission that an initial one-week filing window in which all applicants are deemed simultaneously cut-off on the final date would be prudent in light of the numerous applications likely to be filed when the two-way rules go into effect.

V. The Commission Should Adopt the Technical Standards Proposed In the NPRM

The Consortium strongly supports the Commission's proposed technical standards for two-way ITFS and MDS services. The proposed rules are thorough in their non-interference requirements yet flexible in permitting local educators and their wireless cable operators to determine the appropriate approach for implementing two-way services in their community. A number of market specific factors, including geography, existing system configuration, educational needs and consumer demand for advanced wireless services, will factor into the two-way services to be deployed by educators and operators in a particular community. The proposed rules do not and

¹² Indeed, existing ITFS filing procedures require licensees and permittees to review a number of applications all at the same time, also creating a considerable burden.